IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., FIKIRINI, J.A. And KAIRO, J.A.)

CIVIL APPEAL NO. 112 OF 2018

SONORA GOLD AND CORPORATION..... 1ST APPELLANT

DJ MINES LIMITED ..... 2ND APPELLANT

VERSUS

MINISTER FOR ENERGY AND MINERALS .....RESPONDENT

(Appeal from the Ruling and Drawn Order of the High Court of Tanzania at Dar es Salaam

(Munisi, J.)

dated the 6th day of June, 2018
in
Civil Appeal No. 35 of 2011

RULING OF THE COURT

18th March, & 6th April, 2022

KAIRO, J.A.:

The appellants in this appeal seek to challenge the decision of the High Court of Tanzania, Dar es Salaam Registry in Civil Appeal No. 35 of 2011 delivered on 6th June, 2012.

The brief facts resulting to this dispute are as follows:- On 19th September, 2009, Dr. Abdallah Omar Kigoda was issued with a Primary Mining Licence No. 0010145 (the PML). In year 2010, the PML was converted to Mining Licence No. 413/2020 (the ML). Following the said conversion, M/S Omar Abdallah Kigoda, as a legal representative of and

on behalf of Dr. Abdallah Omary Kigoda and M/S Omar Abdallah Kigoda entered into an exploration and purchasing option agreement with the appellants on 6th October, 2010.

The facts further revealed that, on 16th October, 2010, the appellants applied for registration of the said optional agreement to the Commissioner for Minerals (hereinafter the Commissioner). It appears the Commissioner had some reservations concerning the application and directed the 1st appellant, CANACO Resources (Tanzania) Ltd (hereinafter CANACO) and Dr. Kigoda to convene a joint meeting in his office on 25th October, 2010 so as to resolve a dispute on the competing interests among them. The meeting seems to have been conducted.

On 28th October, 2010 the Commissioner wrote to the parties; that was the 1st appellant, CANACO and Dr. Kigoda directing them to resolve their business arrangement amicably and report to him by 29th November, 2010. It is not clear whether the Commissioner's directive was complied with or not. However, on 2nd December, 2010, the Commissioner ordered Dr. Kigoda to surrender the ML No. 413/2010 to the Commissioner for its return to the Minister for cancellation and issuance of Small Mining License (SML) instead. Meanwhile, the Commission declared the agreements involving Dr. Kigoda and foreign

companies or individuals to be deemed illegal and ordered for their termination within one week.

The orders did not amuse the appellants who on 8th December, 2010 opted to refer the dispute to the Minister. While the appeal was still pending, on 15th December, 2010 the Minister issued a default notice to Dr. Kigoda which was followed by a cancellation order of the mining licence vide a letter dated 1st February, 2011.

Further aggrieved, the appellants appealed to the High Court to challenge the Minister's decision as provided under section 65 (2) of the Mining Act, No. 14 of 2010. The High Court dismissed the appeal on the ground that the appellants had failed to demonstrate sufficient interest which entitled them to appeal (*locus standi*). Still adamant, the appellants lodged this appeal to the Court armed with two grounds as follows:-

1. *The learned High Court Judge erred in law and fact in holding that the appellants had no locus standi to appeal against the order of the Minister for Energy and Minerals which cancelled the Mining Licence No. 413/2010 dated 1st February, 2011.*
2. *The learned High Court Judge erred in law in determining the question of locus which required a consideration of evidence as preliminary objection.*

At the hearing of the appeal, the appellants were represented by Mr. Gaspar Nyika assisted by Ms. Faiza Salah, both learned counsel. On the other hand, the respondent enjoyed the services of Ms. Mercy Kyamba, Principal State Attorney assisted by Mr. Mkama Musalama and Ms. Gati Museti, both learned State Attorneys.

Prior to the commencement of the hearing, the Court wanted to satisfy itself on the propriety of the appeal before it, regard being whether or not the appellants obtained requisite leave of the Court before filing this appeal. However, for expeditious determination of the matter, the Court ordered the parties to submit for and against on both; the point raised *suo motu* as well as the substantive appeal. As it is the custom, the Court shall first determine the issue raised *suo motu* because its outcome has a bearing on proceeding with the determination of the appeal before us.

Addressing us on the issue, Mr. Nyika submitted that the applicant had filed application No. 147 of 2013 into which they made two prayers under section 11 (1) and 5 (1) (c) of the appellate Jurisdiction Act, 1979 Cap 141 RE 2002 (now RE 2019) and Rule 45 (a) of the Tanzania Court of Appeal Rules, 2009 and section 95 of the Civil Procedure Act No. 33 RE 2002 as follows; **one**; extension of time within which to apply for leave to appeal to the Court, and **two;** leave to appeal to the Court

against the judgment and decree of the High Court delivered by Hon. Munisi, J. on 6th June, 2012. He referred us to the chamber summons appearing at page 89 of the record of appeal to verify his contention. He went on submitting that following the said prayers, the Hon. Judge in his ruling granted both prayers. Mr. Nyika referred us to page 158, last paragraph of the record of appeal to back up his contentions. Mr. Nyika maintained that though the Hon. Judge was required to be clearer in the referred paragraph but what is certain is that he did not reject the prayer for leave to appeal to the Court. He added that, the last sentence at page 158 of the record of appeal plainly shows that the prayer for leave was not refused thus, the same was granted. Mr. Nyika referred us to the drawn order at page 160 of the record of appeal which he argued to confirm the grant of the leave by Hon. Judge. He thus prayed the Court to hold that, the requisite leave of the Court was sought and granted before filing the appeal.

Responding to the point raised *suo motu* by the Court, Ms. Kyamba firmly submitted that the requisite leave was not granted to the appellants before lodging the appeal. She argued that, the appellants' reliance on the drawn order to verify the grant of leave is incorrect as the extracted drawn order does not tally with the ruling which it is drawn from.

In further elaboration, Ms. Kyamba submitted that, though it is true that the appellants prayed for leave as stated in the chamber summons, but the Court never granted it. She argued that, since the appeal was subject to leave which was not granted, the lodged appeal was incompetent and ought to be struck out.

As a rule of thumb goes, whenever there is a point of law, the Court, has to determine it first before embarking to determine a substantive matter before it. Likewise in the case at hand, the Court shall first determine the point of law it raised *suo motu.*

It is not in dispute that the order which is a subject of appeal is governed by the provisions of section 5(1) (c) of the Appellate Jurisdiction Act (the AJA) Cap 141 R.E. 2019 which requires leave of the court to be granted before lodging the appeal.

Further, it is not in dispute that the appellants had on 20th June, 2013 filed a chamber summons in the High Court of Tanzania Dar es Salaam Registry seeking **one;** extension of time within which to apply for leave to appeal to the Court, and **two;** leave to appeal to the Court against the decision of the High Court dated 6th June 2012. The parties are at one that the first prayer was granted by the High Court on 27th December, 2016. However, the controversy lies with the grant of leave

to appeal to the Court; the issue being whether or not the sought leave to appeal was granted to the appellants.

It is Mr. Nyika's argument that the prayer for leave to appeal to the Court was granted alongside the prayer for extension of time within which to apply for leave to appeal to the Court while the rival argument by Ms. Kyamba is to the effect that no leave to appeal was ever granted by the Court.

As earlier stated, it is glaring that before the High Court, the appellant sought for **one;** orders for extension of time within which to apply for leave to appeal to the Court, and **two;** leave to appeal to the Court. For ease of reference, the application at pages 157-158 was treated inter alia in the following manner by the High Court: -

> *"In this matter, breach of principles of natural justice is alleged as a basis for a claim for illegality of the challenged decision. In my view this point is of sufficient importance, it is apparent on the face of the record and it needs no long drawn arguments or process to discover it. As such the principle laid down in VALAMBIA'S case applies in this matter.*
>
> *For the foregoing reasons,* ***I grant this application for extension of time*** *in which* ***to***

apply for leave to appeal to the Court of Appeal of Tanzania

The application is so granted with costs."

[Emphasis added]

DATED at Dar es Salaam this 27th day of December, 2016.

.....

Signed."

Basing on the quoted paragraph, we are with firm view that, the High Court unequivocally granted the prayer for the extension of time within which to apply for leave to appeal to the Court and no more. Nowhere the High Court stated to have also granted leave to appeal to the Court. That apart, going through the High Court discussion, we observed that the learned Judge dealt with the pleaded illegality by the appellants (applicant therein) as a ground warranting the grant of the extension of time. This can as well be discerned in the cases considered by the High Court in relation to the prayers for extension of time and not leave to appeal as reflected from page 156 to page 158 of the record of appeal.

We are alive to the fact that Mr. Nyika also relied on the extracted drawn order to assert that the application for leave to appeal was also granted by the High Court. But as correctly submitted by Ms. Kyamba that essentially a drawn order is extracted from the ruling concerned

which means, it should not be in variance with the ruling. The wanting question therefore is whether the drawn order in the matter at hand is in line with the ruling. We herein reproduce the drawn order extracted from the ruling at issue for ease of reference:-

"IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 147 OF 2013

SONORA GOLD AND CORPORATION..... 1ST APPLICANT

DJ MINES LIMITED ..... 2ND APPLICANT

VERSUS

MINISTER FOR ENERGY AND MINERALS .....RESPONDENT

DRAWN ORDER

WHEREAS: *SONORA GOLD & CORP and DJ MINES LIMITED (1ST and 2ND Applicant respectively) apply to the court against the MINISTER FOR ENERGY AND MINERALS (Respondent) for the order that:-*

1. *Grants extension of time within which to apply for leave to appeal to the Court of Appeal of Tanzania.*
2. *Grants leave to the applicants to appeal to the Court of Appeal of Tanzania against the judgment and decree of this court delivered on 6th June, 2021.*

This application is coming before Mkasimongwa, J for ruling delivered in chambers this 27th day of December, 2016 in the absence of the parties.

THIS COURT DOTH HEREBY ORDER THAT

The application for extension of time in which to apply for leave to appeal ***as well as for leave to appeal to the Court of Appeal of Tanzania is granted*** *with costs.* [emphasis added]

E. J. MKASIMONGWA
JUDGE
Extracted on this.....day of.....20.."

Flowing from the quoted conclusion of the High Court ruling and the extracted drawn order of the said ruling above quoted, we can say without hesitation that the two are not compatible. We are so saying because the words "***as well as for leave to appeal to the Court of Appeal of Tanzania is granted"*** are not in the learned Judge's ruling. We thus agree with Ms. Kyamba's argument that the extracted drawn order is not in line with the ruling it purports to have been extracted from. Thus, Mr. Nyika's reliance on the extracted drawn order is, with much respect incorrect. After being granted the extension of time to apply for leave to appeal, on 27th December, 2016 the appellants were required to proceed to apply for leave before lodging this appeal which was not the case. Thus, having failed to obtain the requisite leave as prescribed by law, the appeal is in violation of section 5(1) (c) of the AJA which imposes mandatory requirement to the effect that an appeal of this nature can only be pursued after obtaining requisite leave. Therefore, the aforesaid omission renders the appeal incompetent. We

are thus constrained to strike it out as we hereby do. We make no order as to costs since the infraction has been raised by the Court *suo motu*.

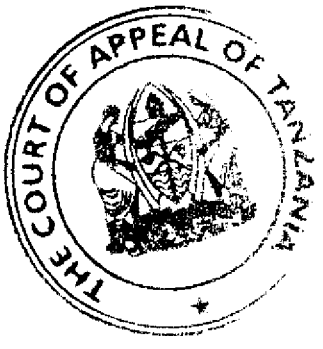
DATED at **DAR-ES-SALAAM** this 1st day of April, 2022.

S. E. A. MUGASHA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

This Ruling delivered on 6th day of April, 2022 in the presence of Ms. Faiza Salah Counsel for the Appellant and Ms. Debora Mcharo learned State Attorney for the respondent, is hereby certified as a true copy of original.



C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL